81314-1

Supreme Court No. ___
(COA No. 59626-8-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WEBB,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Counsel for Michael Webb, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

The Petitioner seeks review of the Court of Appeals' decision dated November 29, 2007, dismissing the appeal and refusing to abate any financial penalties. The Court of Appeals denied a motion for reconsideration without comment on January 15, 2008. Copies of both decision are attached hereto as Appendix A and B, respectively.

C. ISSUES PRESENTED FOR REVIEW

1. Is the Court of Appeals decision contrary to this Court's ruling in State v. Devin,[1] because it refuses to abate a conviction under any circumstances even when no victim claims abatement would cause any harm and the State asserts no harm, refuses to abate fines imposed as part of the penalty portion of the sentence, refuses to abate court costs that do not involve restitution, and ignores the indigency of the deceased appellant in demanding that

[1] State v. Devin, 158 Wn.2d 157, 142 P.3d 599 (2006)

the appellant's heirs pay for court costs?

2. Is the Court of Appeals ruling contrary to Devin and Article I, section 22 of the State Constitution based on the Court of Appeals' refusal to allow counsel for Mr. Webb the opportunity to present any meritorious issues on appeal?

3. Where Devin expressly reserved ruling on future standards for abatement decisions, is there substantial public interest in accepting review to clarify the mandatory and discretionary decisions a court may make when confronted with the abatement of a conviction upon the death of an appellant who has timely filed a notice of appeal?

D. STATEMENT OF THE CASE

On February 2, 2007, Michael Webb was convicted of one counts of presenting a false insurance claim and the court imposed sentence on February 5, 2007. CP 29-37. He timely filed a notice of appeal. CP 38.

Shortly after the imposition of sentence, Mr. Webb was murdered in his home. See Carol Smith, Webb Was Killed With an Ax, Seattle Post Intelligencer, July 20, 2007 (attached as App. E to Appellant's Motion to Abate). His body was discovered about two months later and the King County Prosecuting Attorney arrested

and charged a man with murder for killing Mr. Webb. Id.; see also Man Pleads Innocent in Death of Former Talk Show Host, Seattle Post Intelligencer, July 30, 2007 (attached as App. D to Appellant's Motion to Abate).

Upon learning of Mr. Webb's tragic death, the undersigned attorney who had been appointed to represent Mr. Webb in his appeal filed a motion in the Court of Appeals asking to abate the conviction, premised upon Mr. Webb's death during his timely filed appeal. Appellant's Motion to Abate. Alternatively, counsel asked for the opportunity to review the record and determine whether there were meritorious issues to raise on appeal. Appellant's Reply to State's Response to Abate Appeal, p. 12; Appellant's Motion for Reconsideration, p. 1, 6-7.

The Court of Appeals refused to dismiss the conviction or allow additional time to brief potential issues for the appeal. The Court of Appeals ordered the appeal dismissed and the conviction affirmed, and rejected any efforts to decrease the amount of money Mr. Webb was ordered to pay at sentencing.

The facts are further set forth in the Court of Appeals opinion, *passim*, Appellant's Motion to Abate, page 2, Appellant's Reply to State's Response to Motion to Abate, page 1, 11-12. The facts as outlined in each of these pleadings is incorporated by reference

herein.

E. ARGUMENT

1. THE COURT'S RULING MISCONSTRUES *DEVIN* AS MANDATING THE IMPOSITION OF EVERY LEGAL AND FINANICAL OBLIGATION AND BARRING ABATEMENT IN ANY CONTEXT

The Court of Appeals dismissed Mr. Webb's appeal without considering the merits of the conviction and ordered the imposition of all legal and financial obligations imposed prior to Mr. Webb's death is based on a fundamental misperception of the Supreme Court ruling in State v. Devin, 158 Wn.2d 157, 142 P.3d 599 (2006).

In Devin, the appellant did not file a timely notice of appeal. Id. at 160; see RAP 5.2(a) (notice of appeal); RAP 18.8(b) (extraordinary circumstances and gross miscarriage of justice required to extend time to file notice of appeal). His untimely notice of appeal, filed six months after sentencing, stated he only wished to challenge his sentence and not the conviction. 158 Wn.2d at 160 n.2. It did not contain any indication that he contested the underlying conviction. Id. This Court refused to abate his conviction due to the lack of a timely notice of appeal and the absence of any indication he wanted to appeal his conviction. Id. at 166. Because the Devin Court expressly noted that its

comments on the doctrine of abatement as applied to future cases was simply an "opportunity to address" concerns and not necessary to resolve the case, the ruling's discussion of abatement based on an appellant's death is *dicta*. Id. at 172; see State v. Fontaga, 148 Wn.2d 350, 364, 60 P.3d 1192 (2003) (when court goes "beyond what is necessary to decide case," resulting discussion is not mandatory authority).

In its acknowledged *dicta*, the court in Devin, expressed concern that a long-established doctrine of abating a conviction when an appellant dies during the course of an appeal did not adequately square with modern-day concerns regarding victim's rights. 158 Wn.2d at 168. The victim of attempted murder at issue in Devin signed a declaration stating that the abatement of the conviction caused her emotional distress and she feared that the abatement could cause a child custody court to revisit its decision to award her sole custody of her child, as this award was in part based on Devin's criminal conviction. Id. at 159, 162.

The Devin Court stated a belief that abatement does not taken into account present day concerns with compensating the victim of a crime, as it is focused on a punitive result of a criminal conviction rather than the compensatory results of restitution. Id. at 168-69. Devin stands for the principle that a conviction should not

be abated and nullified when there are outstanding compensatory issues for the victim of a crime. On the other hand, the Devin Court did not "preclude courts from abating financial penalties still owed to the county or State, as opposed to restitution owed to victims, where the death of a defendant pending an appeal creates a risk of unfairly burdening the defendant's heirs." 158 Wn.2d at 172.

The Court of Appeals found Devin mandated a showing of an unfair financial burden upon the appellant's heirs before it will void any court costs. Yet Devin does not require actual evidence of a financial burden upon the appellant's heirs, but rather speaks of the "risk" of imposing an unfair burden. 158 Wn.2d at 172. The analysis below is incorrect, because Devin abatement of a conviction only when a person has neither filed a timely appeal nor explicitly indicated a desire to appeal the conviction, and Devin does not preclude abatement of a conviction in other circumstances. See Burkhart v. Harrod, 110 Wn.2d 381, 391, 755 P.2d 759 (1988) (Utter, J., concurring) (advisory legal analysis is *dicta* and "and not controlling on a future case presenting different facts"). Because the Devin Court declined, even in its *dicta*, to abandon the notion that a court may abate *ab initio* an appeal when an appellant files a timely notice of appeal, the Court of

Appeals misconstrued its authority to act in the interest of justice and abate a conviction upon the unfortunate death of an appellant who has demonstrated his or her desire to appeal and when there are no principled reason to proceed with the merits of the appeal.

In the case at bar, the unfairness of requiring a brutally murdered victim's heirs pay $500 for the crime victim's penalty assessment, $100 for the DNA collection fee, and additional court fees or fines is plainly inferable, and the State asserts no claim of adverse consequences on behalf of the victim of the offense, as occurred in Devin.

In the event counsel of Mr. Webb is required to prove that his heirs are unfairly financially burdened, an appellate court is not the proper forum as it does not make evidentiary determinations to decide whether heirs are financially burdened. If such a showing of actual financial circumstances is required, the case should be remanded to the trial court so that such findings may be made. The Court of Appeals refused to remand the case for any factual determinations.

More importantly, the record itself demonstrates the unfairness of imposing court costs upon Mr. Webb's heirs. The precise reason for the creation of the $500 victim penalty was to help the families like Mr. Webb's whose loved ones are murdered.

Laws of 1996, ch. 122, section 1. The Legislative intent for penalty assessment was to aid compensation for the families of murdered people. Id. The Legislature said, "Specifically, the increased funds from offender penalty assessments will allow more appropriate compensation for families of victims who are killed as a result of the criminal act, including reasonable burial benefits." Id.

Mr. Webb was the murdered victim of a vicious crime, killed by an ax and his dismembered body left for months in crawl space in his own home, and his family and heirs are unquestionably burdened by the mere suffering of such a tragedy. See Appellant's Motion to Abate, App. E (newspaper article detailing circumstances of death). The victim compensation fund was created precisely to help the families of people who are the victims of such deaths. It is palpably unfair and nonsensical to order that Mr. Webb's heirs pay this penalty assessment when they are the people the fund is intended to aid.

It is similarly unfair and nonsensical to order Mr. Webb's heirs to pay to preserve his DNA in a data bank when he is dead and the purported purposes of the DNA data bank are to deter future crimes and identify the perpetrators of crimes. See State v. Surge, 160 Wn.2d 65, 77, 80, 156 P.3d 208 (2007). Mr. Webb cannot be deterred from committing future crimes nor prosecuted

for committing a past crime. His human remains no longer need to be identified. Surge, 160 Wn.2d at 77-78.

Likewise, the Court of Appeal's Court's refusal to dismiss any of the financial obligations, including paying court costs that the State indicated it no longer sought upon Mr. Webb's death, is unfair. Mr. Webb's personal finances were reviewed by the trial court when the court signed an order of indigency, permitting the appeal to proceed in forma pauperis. Plainly, Mr. Webb had little financial resources prior to his murder. Given the limited nature of whatever estate he could conceivable have and be indigent, it is appropriate for this Court to vacate the costs imposed by virtue of his conviction.

Unlike Devin, there are no civil court consequences of Mr. Webb's conviction that make the conviction important to a victim. Unlike Devin, Mr. Webb died as the victim of a homicide and the notion that no unfairness occurs when his heirs are ordered to pay court costs for no legitimate purpose is simply wrong and patently unfairly burdensome to his family or heirs. Finally, unlike Devin, Mr. Webb unequivocally asserted his right to appeal his conviction, and at the least, he should be allowed to do so. 157 Wn.2d at 166.

2. THE COURT OF APPEALS RULING DISREGARDS THE REQUIREMENT IN *DEVIN* THAT AN APPEAL FOR A DECEASED APPELLANT SHOULD PROCEED ON ANY MERITORIOUS ISSUES

In Devin, this Court expressly declined to articulate a rule on abatement of an appeal upon the death of an appellant to apply in future cases. 158 Wn.2d at 167. Article I, section 22 of the Washington Constitution guarantees a person convicted of a crime, "the right to appeal in all cases." City of Seattle v. Klein, 161 Wn.2d 554, 166 P.3d 1149 (2007) (rejecting State's claim that waiver of appeal may be inadvertent, as "a constitutional right to appeal can be waived only voluntarily, knowingly, and intelligently.").

Mr. Webb's death was discovered when the instant appeal was perfecting. Upon learning of his death, appellate counsel asked the Court of Appeals to abate the appeal and conviction, and alternatively asked that the Court of Appeals permit the resolution of the appeal on its merits. Reply to State's Response, p. 12. The Court of Appeals refused to give counsel for Mr. Webb any time to review the merits of the appeal and denied without comment the motion for reconsideration in which counsel reiterated that the merits of the appeal had not yet been considered.

Counsel for Mr. Webb has not yet had the opportunity to

review the case on its merits and should be given such an opportunity under this Court's articulation of the factors to consider prior to dismissing an appeal under Devin. Accordingly, the dismissal order entered by the Court of Appeals should be stayed while counsel determines whether there are meritorious issues that would balance the equities in favor of abating the appeal and conviction.

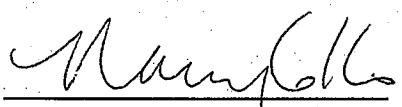
Furthermore, accepting review of the case at bar would serve the public interest. The Court of Appeals' unduly narrow and strict reading of Devin indicates the Court does not believe it retains any discretionary authority to abate a conviction, when an indigent appellant is the victim of a homicide or otherwise. Because the Devin Court expressly refrained from articulating the standards that the courts should apply in future cases and the Court of Appeals perceived itself as wholly limited in its authority following Devin, review of this issue would be in substantial public interest.

F. CONCLUSION

For the reasons stated above, this Court should accept review under RAP 13.4(b)(2), (3) and (4).

Dated this 14th day of February 12, 2008.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. MICHAEL WEBB, Appellant.	)	No. 59626-8-I ORDER GRANTING MOTION TO DISMISS APPEAL AND DENYING MOTION TO ABATE CONVICTION

Counsel for appellant Michael Webb has filed a motion to abate Webb's pending appeal and the underlying conviction following Webb's death. A commissioner referred the motion to a panel of judges. We agree that the appeal should be dismissed, but deny the motion to abate the underlying conviction and financial obligations.

On February 2, 2007, Webb was convicted of one count of presenting a fraudulent insurance claim, a Class C felony. See RCW 48.30.230. The court imposed a first-time offender sentence of 240 hours of community service and the following financial obligations: (1) $500 victim penalty assessment; (2) $443.90 court costs; (3) $100 DNA collection fee; and (4) $1,000 fine. The judgment and sentence indicates that restitution was to be determined, but no restitution order was ever filed.

Michael Webb filed a timely notice of appeal, but was murdered while the appeal was pending. Webb's appellate counsel argues that the tragic circumstances of Webb's death warrant vacating both Webb's appeal and the underlying conviction and financial penalties.

In State v. Devin, 158 Wn.2d 157, 142 P.3d 599 (2006), our supreme court recently addressed the validity of the common law "ab initio" doctrine as adopted in State v. Furth, 82 Wash. 665, 144 P. 907 (1914), which provided that absent a contrary statute, the death of a criminal defendant with a pending appeal "permanently abates the action and all proceedings under the judgment." Furth, 82 Wash. at 667. The rule was originally based on the "outdated premise that convictions and sentences serve only to punish criminals, and not to compensate their victims" and on a presumption of innocence pending appeal. Devin, 158 Wn.2d at 157-58.

But statutory and constitutional changes since Furth, including restitution provisions and victim penalty assessments, have increasingly reflected a compensatory purpose. Devin, 158 Wn.2d at 168. Application of the ab initio rule may therefore cause both financial and emotional harm to crime victims. See Devin, 158 Wn.2d at 170-71. The court also rejected the proposition that there is a presumption of innocence pending appeal. Devin, 158 Wn.2d at 169.

Based on the foregoing analysis, the Devin court concluded that the ab initio rule was both incorrect and harmful and overruled Furth "to the extent that it automatically abates convictions as well as victim compensation orders upon the death of a defendant during a pending appeal." Devin, 158 Wn.2d at 171-72. But the court declined to fashion a bright-line replacement rule:

> [W]e do not preclude courts from abating financial penalties still owed to the county or State, as opposed to restitution owed to victims, where the death of a defendant pending an appeal creates a risk of unfairly burdening the defendant's heirs. We also do not preclude courts from deciding a criminal appeal on the merits after the appellant has died, if doing so is warranted.

Devin, 158 Wn.2d at 172.

Under Devin, we consider several factors when determining a motion to abate a pending appeal and conviction following the defendant's death, including: (1) the absence of any presumption of innocence pending appeal; (2) the merits of the pending appeal; (3) the financial and emotional effects of abatement on any victims; and (4) whether, or to what extent, continuing financial obligations unfairly burden the defendant's heirs or estate. A review of these factors does not support abatement of Webb's conviction and financial obligations.

Nothing in the record suggests there is any potentially meritorious appellate issue that might warrant a decision on the merits. Although the crime in this case did not result in a restitution order for specific victims, the financial obligations imposed, including the victim penalty assessment, court costs, and the DNA collection fee, reflect broader compensatory purposes than mere punishment of the defendant. Such financial obligations, which are owed primarily to the county or State, rather than to specific victims, are subject to abatement, but only if there is "a risk of unfairly burdening the defendant's heirs." Devin, 158 Wn.2d at 172. No such allegation or showing is present here.

Under the circumstances, we agree that dismissal of Webb's appeal is appropriate, but deny the motion to abate Webb's underlying conviction and financial obligations.

The State characterizes the $1,000 fine as a mandatory VUCSA fine and concedes that it was not statutorily authorized and should be abated. But paragraph 4.2 of the judgment and sentence refers only to a $1,000 fine; none of the preprinted boxes

associated with the VUCSA fine are checked. Nor does the State identify anything in the record indicating that this financial penalty was anything other than the general fine authorized for a Class C felony. See RCW 9.94A.550. We therefore reject the State's concession, but the parties remain free to pursue the State's offer to rescind the fine "by agreed order of the parties."

Counsel for Webb asserts that much of the court's legal analysis in Devin is both dicta and legally flawed. Such arguments must be directed to the supreme court.

Now, therefore, it is hereby

ORDERED that the motion to abate the pending appeal is granted and the appeal is dismissed; and, it is further

ORDERED that the motion to abate the underlying conviction and financial obligations is denied.

Done this 29th day of November, 2007.

Dwyer, J.

Ellington, J.

Becker, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,, v. MICHAEL WEBB, Appellant.	)	No. 59626-8-I ORDER DENYING MOTION FOR RECONSIDERATION

Counsel for appellant Michael Webb has filed a motion seeking reconsideration of this court's November 29, 2007 "Order Granting Motion to Dismiss Appeal and Denying Motion to Abate Conviction" or, in the alternative, seeking to stay dismissal of the appeal. The panel has considered the motion and has determined that said motion should be denied.

Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

DATED this 15th day of ~~December~~ January, 2008.

FOR THE PANEL:

Judge

DECLARATION OF MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, a true copy of the document filed under **Court of Appeals No. 59626-8-I** (for transmittal to the Supreme Court) to which this declaration is affixed/attached, was mailed or caused to be delivered to each attorney or party or record for ☒ respondent **James Whisman - King County Prosecuting Attorney**, ☐ appellant and/or ☐ other party, at the regular office or residence or drop-off box at the prosecutor's office.

MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: February 12, 2008